No. 03-0163

Supreme Court, U.S.
FILED
OCT 2 - 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

THE CITY OF SAN ANTONIO,

Petitioner,

v.

ENCORE VIDEOS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Fifth Circuit err in determining that the City's content correlated sexually oriented business zoning ordinance violated the First and Fourteenth Amendments to the United States Constitution for failing to narrowly regulate only those businesses shown to cause adverse external secondary effects where there was no evidence in the legislative record that businesses such as Respondent's that did not offer on-premises viewing of sexually explicit films caused the adverse secondary effects sought to be mitigated by the ordinance?

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Respondent Encore Videos, Inc. is a Texas corporation. None of its shares are held by a publicly traded company and there are no parent companies.

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STATEMENT OF THE CASE

The City has filed a Petition for Writ of Certiorari on the issue of whether the Fifth Circuit erred in declaring the San Antonio sexually oriented business zoning ordinance unconstitutional as applied to businesses that do not offer on-premises viewing of films in the absence of any evidence in the legislative record concerning adverse secondary effects caused by these type of businesses.

Respondent Encore Video, Inc. operates a retail video store located at 1031 N.E. Loop 410 in the City of San Antonio, Texas. Respondent's video store sells video cassettes, DVD's, and magazines for off-premises consumption only. No live entertainment or films are exhibited on the premises.

On April 27, 1995, the San Antonio City Council enacted Ordinance No. 82135, which regulated the locations available for the operation of sexually oriented businesses within the city limits. App. 65a. Ordinance No. 82135 provided, *inter alia*, that sexually oriented businesses were prohibited from operating within 1,000 feet of places of worship, schools, public parks, and the Central Business District. Respondent's store is located within 1000 feet of residential property, separated by Loop 410.

The City refused to issue Respondent a certificate of occupancy on the basis that it failed to meet the distance requirements under the ordinance. Under the threat of closure, Respondent filed a complaint against the City seeking declaratory and injunctive relief alleging that Ordinance No. 82135 was unconstitutional on its face and as applied.

In response, the City amended and re-enacted the ordinance as Ordinance No. 87443 in an effort to remedy certain constitutional deficiencies. The new ordinance went into effect on March 10, 1998.

Among the amendments contained in Ordinance 87443 was a clarification in the definition of "Adult Bookstore." App. P. 70a. Because the language of this definition is crucial to the determination of the issues in this case it will be quoted in full here:

> "Adult Bookstore" means an Adult Bookstore, Adult Novelty Store, or Adult Video Store where more than 20% of its inventory (that is offered for sale, rental or viewing for any form of consideration to on-premises customers) or floor space consists of one or more of the following:
>
> (a) books, magazines, or sound recordings or printed, visual or audio material of any kind which are characterized by their emphasis on the description or depiction of specified anatomical area or specified sexual activities; or
>
> (b) non-contraceptive instruments, toys, or paraphernalia designed for use in connection with specified sexual activities, books, magazines, pamphlets, pictures, drawings, photographs, motion picture films, or sound recordings, or printed visual or audio material of any kind, which, because of the depiction or description of specified sexual activities in the materials offered for sale, is restricted to adults. Novelty designed as sight gags, advertised as such and not designed or advertised for sexual activity, are not instruments or devices as defined and regulated herein.

The parties filed cross motions for summary judgment. The District Court upheld Ordinance 87443 in an amended order, dated October 2, 2000. App. 20a-62a. The District Court held that Ordinance No. 87443 did not vest unbridled discretion in the licensor for failing to provide specified time limits for the numerous mandated inspections prior to the issuance of a certificate of occupancy. Pet. App. 26a-32a. The Court further determined that the City had a reasonable belief that the Ordinance would address negative secondary effects attributable to sexually oriented businesses.

On appeal, the Fifth Circuit reversed the District Court order with regard to the zoning restriction. *Encore Videos, Inc. v. City of San Antonio,* 310 F.3d 812 (5th Cir. 2002). The City filed a petition for rehearing en banc. The petition for rehearing was denied, but the Fifth Circuit issued a new opinion superseding the original opinion, that altered the analysis but not the result. *Encore Videos, Inc. v. City of San Antonio,* 330 F.3d 288 (5th Cir. 2003). After examining the studies contained in the legislative record, the Fifth Circuit once again struck down the zoning restriction on the basis that, given "the extensive reach of the ordinance, we must require at least some substantial evidence of the secondary effects of establishments that sell adult products solely for off-site consumption. Otherwise, even ordinary bookstores and video stores with adult sections could be subjected to First Amendment rights without evidence that they cause secondary effects." 330 F.3d, at 295. Because the City failed to produce any evidence of adverse secondary effects specific to businesses that sell books or videos solely for off-site entertainment,

the Fifth Circuit found the zoning restriction to be unconstitutional. *Id.*

REASONS THE PETITION SHOULD BE DENIED

I. THE FIFTH CIRCUIT DECISION IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS DECIDED PRIOR TO THIS COURT'S DECISION IN *CITY OF LOS ANGELES V. ALAMEDA BOOKS, INC.*, 535 U.S. 425 (2002)

The City asserts that the Fifth Circuit decision in the instant case is in conflict with the decisions of the Eighth, Tenth, and Sixth Circuits in the cases of *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1418, (8th Cir. 1994); *Z.J. Gifts, D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 687 (10th Cir. 1998); and *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 437 (6th Cir. 1998). However, an examination of these cases, decided prior to this Court's recent decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), indicates these cases need to be re-examined in light of that decision. As such, there does not exist a clear split in the circuits because this Court's recent decision in *Alameda Books* modified the analysis of evidence required to support a content correlated time, place and manner regulation of adult businesses.

This Court, in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), upheld an adult zoning ordinance regulating theaters providing adult films "for observation by patrons therein" as being consistent with the First Amendment subject to certain limitations. When the government imposes restrictions on protected speech it

bears the burden of justifying the restriction. "In the absence of a factual basis substantiating the harm and the efficacy of its proposed cure, [the courts] cannot assume the harm exists or that the regulation addresses it." *Denver Area Educational Telecommunications Consortium, Inc. v. FCC,* 518 U.S. 727, 135 L.Ed.2d 888, 917 (1996).

In order to impose zoning restrictions on adult businesses, the ordinance must serve a substantial government interest and allow for reasonable alternative avenues of communication. *Renton* expressly recognized that such an ordinance should be "'narrowly tailored' to affect only that category of theatres shown to produce the unwanted secondary effects thus avoiding the flaw that proved fatal to the regulations in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) and *Erznoznick v. City of Jacksonville*, 422 U.S. 205 (1975)." *City of Renton*, 475 U.S. 41, at 52.

This Court's decision in *Alameda Books Inc.*, 535 U.S. 425, clarified the procedure and level of proof for justification of the type of ordinance upheld in *Renton*. While Justice O'Connor's plurality opinion in *Alameda Books* relied upon *Renton* for the principle that a municipality may rely upon relevant evidence to demonstrate a connection between speech and a substantial independent government interest, it indicated that the government need prove more than just some rational relationship between the regulation and the government interest. The plurality opinion stated, "This is not to say a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance." *Id.*, at 438.

> First, what proposition does a city need to advance in order to sustain a secondary effects ordinance? Second, how much evidence is required to support the proposition?

Alameda Books, id., at 449. (Kennedy, J. concurring in the result). *Alameda Books* provided clarification of these issues that calls into question the decisions in the cases the City asserts are in conflict with the Fifth Circuit decision in the instant case.

The cases the City claims are in conflict with the instant case were decided without the benefit of *Alameda Books*. As recognized by the Fifth Circuit in its opinion, neither the decision in *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1418 (8th Cir. 1994), nor *Z.J. Gifts, D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 687 (10th Cir. 1998), engaged in any meaningful analysis of the evidence advanced to support the zoning ordinances. In both cases, the courts deferred to the judgment of the local legislative bodies without any critical examination of the record for flawed reasoning or shoddy data.

Recently, a federal district court in Minnesota in *DiMa Corporation v. High Forest Township*, 2003 WL 21909571 (D. Minn. Aug. 7, 2003), acknowledged that the Eighth Circuit decision in *ILQ* did not conclusively preclude examination of the legislative record concerning the secondary effects of a business that did not provide on-premises viewing of adult material under the *Alameda Books* decision. While the district court did not address the issue of whether *Alameda Books* overruled *ILQ*, the court determined that "under the standard set forth in *Alameda Books*, the Court finds that genuine issues of fact exist as to whether High Forest Township was reasonable in

relying upon the studies that provided the rationale for the ordinance." *Id.*, at * 4.

In *Z.J. Gifts, D-2, L.L.C. v. City of Aurora*, 136 F.3d at 687, the Tenth Circuit did not give any weight to the evidence relied upon by the district court that contradicted the justification for the ordinance. As stated by Untied States District Court Judge Richard Matsch in ruling on cross-motions for summary judgment, "[t]he problem here is that none of the material relied on by the city council shows that the business of Christie's bears any relationship to such [secondary] effects. Indeed, in the matter of any increase in crime, the evidence is distinctly to the contrary." *Z.J. Gifts, D-2, L.L.C. v. City of Aurora*, 932 F.Supp. 1256, 1258 (D. Colo. 1996). Thus, in light of the rejection of "shoddy reasoning or data" to support content correlated zoning ordinances in *Alameda Books*, the result in the Tenth Circuit in *Z.J. Gifts* might well be different today.

The other case claimed by the City to create a circuit conflict, *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 437 (6th Cir. 1998), was not mentioned by the Fifth Circuit in its opinion because it did not deal in any shape or form with the issue presented in this case. In *Richland*, an adult video store (defined as principal or predominant amount of stock-in-trade as adult material) that did not have on-premises viewing, unsuccessfully challenged a limitation on hours of operation and a restriction on private viewing arcades. The City erroneously contends there is a conflict between the instant case and *Richland Bookmart* when the legal issues are not related in any significant way.

Contrary to the assertions of the City, there is no clear conflict between the Fifth Circuit's decision in this case and the aforementioned decisions in the Sixth, Eighth, and Tenth Circuits. All of those decisions were decided prior to this Court's decision in *Alameda Books*. To the extent there may be some inconsistencies in the results of these cases, these inconsistencies are capable of being resolved by the lower courts as demonstrated in *DiMa Corp. v. High Forest Township*. If recurring problems concerning the application of *Alameda Books* arise, then that issue will be determined by this Court at that time. However, at the present time this is not a concrete problem that needs to be resolved by this Court.

II. THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS IN *CITY OF RENTON V. PLAYTIME THEATRES, INC.*, 475 U.S. 41 (1986) AND *CITY OF LOS ANGELES V. ALAMEDA BOOKS, INC.*, 535 U.S. 425 (2002)

City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 52 (1986) upheld an adult zoning ordinance on the basis it was "narrowly tailored to affect only that category of theatres shown to produce the unwanted secondary effects . . ." The San Antonio ordinance struck down in this case is *not* narrowly tailored to affect *only* the category of businesses *shown* to produce the unwanted secondary effects. There is no evidence to show that video stores that sell only materials for off-premises consumption and carry only 20% of their stock in adult materials cause negative external effects on the community. Further, the ordinance is so broad as to restrict businesses that have not been shown to cause these adverse external effects.

Under the express language of *Renton*, the San Antonio ordinance fails to meet the narrow tailoring requirement. The decision in *Alameda Books* only adds support to this position. As stated by Justice Kennedy in his opinion concurring in the result, "a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact. . . . A city may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Alameda Books*, 535 U.S., at 122 S.Ct., at 449. Justice Kennedy concluded that the ordinance could survive summary judgment because the city could claim the "ordinance will cause two businesses to split rather than one to close, that the quantity of speech will be substantially undiminished and that total secondary effects will be significantly reduced." *Id.*

The effect of the San Antonio ordinance is far different. The quantity of speech will be reduced since mainstream book and video stores will be required to monitor and adjust their inventory to limit adult themed features to less than 20% of their inventory or floor space. Ordinance 87443, Section 1 (2), Pet. App. 70a. There is no indication that such an onerous restriction will serve to reduce any secondary effects because there is no evidence to suggest that these types of businesses even have any external secondary effects any different from any neighborhood video store that may carry 10-15% adult titles.

The San Antonio ordinance challenged in the instant case applies to businesses that offer 20% of their stock or floor space as adult materials, not a "principal business purpose," as in the ordinance struck down in *FW/PBS,*

Inc. v. City of Dallas, 493 U.S. 215, 253-254, n.5 (1990) (Scalia, J. dissenting). See also *Renton*, 475 U.S., at 44 (defining adult theaters as "an enclosed building used for presenting [adult films] for observation by patrons therein.") Under the definitions in the Renton and Dallas ordinances, "the quantity of speech will be substantially undiminished and . . . total secondary effects will be significantly reduced." *Alameda Books*, 535 U.S., at 449 (Kennedy, J. concurring in the result).

In contrast, the Fifth Circuit found, under the San Antonio ordinance, "even ordinary bookstores and video stores with adult sections could be subjected to regulation that restrict their First Amendment rights without evidence that they cause 'secondary effects.'" *Encore Videos, Inc.*, 330 F.3d at 295. The impact of the San Antonio ordinance is substantial and may seriously impact this type of mainstream retail business.

Contrary to the City of San Antonio's assertion that the panel opinion was in conflict with this Court's decisions, the opinion in this case applied the proper standard in light of *Alameda Books*. After reviewing the three studies relied upon by the City to justify the ordinance, the panel correctly determined that these studies failed to account for a completely different type of business than that considered in the studies. "Given the expansive reach of the ordinance in the instant case, we must require at least some substantial evidence of secondary effects of establishments that sell adult products solely for off-site consumption." *Id.*, 330 F.3d at 295. The panel concluded, "the city was required to provide at least some substantial evidence of secondary effects specific to adult businesses, that sell books or videos solely for off-site entertainment."

Id. The City wholly failed to present any such evidence to support this broad regulation.

Under Justice Kennedy's concurring opinion, any regulation of speech to control the adverse external effects of a business must leave the quantity of speech "substantially undiminished." This is consistent with the requirement of *Ward v. Rock Against Racism*, 491 U.S. 781, at 799 (1989), that the government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."

Alameda Books did, in fact, impose substantive requirements on municipalities to justify regulations that have the effect of limiting expression. In the instant case, there is no evidence in the record relating to the adverse effects of retail businesses that have 20% of their stock-in-trade materials for off-premises viewing. There is no live entertainment or viewing of sexually explicit films on the premises. In the absence of any evidence pertaining to video stores, a municipality cannot simply broadly regulate categories of businesses not shown to produce the unwanted external effects of adult businesses.

Thus, the Fifth Circuit correctly relied upon the *Renton* and *Alameda Books* opinion, as well as other Supreme Court cases concerning the narrow tailoring standard applicable to time, place, and manner regulations. The Fifth Circuit decision in this case faithfully applies the decisions of this Court and protects the rights guaranteed to all citizens by the First and Fourteenth Amendments to the United States Constitution. The Petition for Writ of Certiorari should be denied.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, Respondent respectfully requests the Court deny the Petition for Writ of Certiorari.

Dated: October 2, 2003.

Respectfully submitted,

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